Petition

Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

81-490

Case No.—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY HERNANDEZ, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY ROTHBLATT
155 S. Miami Avenue
Suite 1111
Miami, Florida 33130
(305) 374-3770
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a Defendant's fourth amendment right against unreasonable searches and seizures is violated when the trial court allows cross-examination which elicits statements that are subsequently impeached by the admission of illegally seized evidence when such cross-examination is not squarely within the scope of testimony elicited on direct examination.

II. Whether the court below erred in sustaining the trial court's refusal to grant the Defendant's Motion for a Mistrial when defense counsel made reference to the Defendant's Fifth Amendment privilege during the government's cross-examination.

III. Whether the trial court erred in finding that there was sufficient independent evidence of a conspiracy, and that the Defendant participated therein, so as to admit co-conspiratorial hearsay.

TABLE OF CONTENTS

Jurisdiction 1

Questions presented 1

Statement of the case and facts 2

Statutory provisions involved 9

Reasons for granting the writ--

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN Agnello v. United States, 269 U.S. 20 (1925), AND SUBSEQUENT CASES AS IT ALLOWS THE ADMISSION OF ILLEGALLY SEIZED EVIDENCE TO CONTRADICT THE DEFENDANT'S TESTIMONY WHEN SUCH TESTIMONY IS ELICITED BY CROSS-EXAMINATION WHICH IS ONLY TANGENTIALLY RELATED TO MATTERS TESTIFIED TO ON DIRECT EXAMINATION 9

II. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR A MISTRIAL AS THE GOVERNMENT, THROUGH ITS IMPROPER LINE OF QUESTIONING, FORCED THE DEFENDANT TO EITHER INCRIMINATE HIMSELF OR CLAIM HIS FIFTH AMENDMENT PRIVILEGE ... 19

III. UNDER THE STANDARD FOR ADMITTING CO-CONSPIRATOR HEARSAY ESTABLISHED IN United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), THERE WAS INSUFFICIENT INDEPENDENT PROOF NECESSARY TO ESTABLISH A CONSPIRACY AND THE DEFENDANT'S PARTICIPATION THEREIN 21

Conclusion 23

Appendix--

Opinion of the Court of Appeals 1a

Order denying Petition for Rehearing 37a

TABLE OF AUTHORITIES

Cases:

Agnello v. United States, 269 U.S. 20 (1925) 9,10,11,13,17,18

Harris v. New York, 401 U.S. 222 (1971) 14

Miranda v. Arizona, 384 U.S. 436 (1966) 14

Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969) 22

Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920) 11

Walder v. United States, 347 U.S. 62 (1954) 13

United States v. Brown, 546 F.2d 166 (5th Cir. 1977) 20

United States v. Havens, 592 F.2d 848 (5th Cir. 1979) 10

United States v. Havens, 446 U.S. 620 (1980) 12,15,16,17

United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979) 21

United States v. Nixon, 418 U.S. 683 (1974) 22

Constitutional provisions and statutes:

U.S. Constitution, Amendment IV 9

21 U.S.C. 841 2

21 U.S.C. 846 2

28 U.S.C. 1254 1

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 1, 1981. A timely Petition for Rehearing and a timely Petition for Rehearing en banc were denied without opinion on July 22, 1981. This Petition for Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether a Defendant's fourth amendment right against unreasonable searches and seizures is violated when the trial court allows cross-examination which elicits statements that are subsequently impeached by the admission of illegally seized evidence when such cross-examination is not squarley within the scope of testimony elicited on direct examination.

II. Whether the court below erred in sustaining the trial court's refusal to grant the Defendant's Motion for a Mistrial when defense counsel made reference to the Defendant's Fifth Amendment privilege during the government's cross-examination.

III. Whether the trial court erred in finding that there was sufficient independent evidence of a conspiracy, and that the Defendant participated therein, so as to admit co-conspiratorial hearsay.

STATEMENT OF THE CASE AND FACTS

The Defendant, Anthony Hernandez, was convicted of conspiracy to possess methaqualone in violation of 21 U.S.C. §§ 841 (a) (1) and 846, possession with intent to distribute methaqualone in violation of 21 U.S.C. §841 (a) (1), and distribution of methaqualone in violation of U.S.C. §841 (a) (1). The Defendant appealed his conviction to the Fifth Circuit Court of Appeals, raising three issues as grounds for reversal of the

conviction, to wit: 1) the improper admission of illegally seized evidence for purposes of impeachment; 2) the prosecution's improper questioning calculated to force appellant to invoke his Fifth Amendment privilege; and 3) the improper admission of co-conspiratorial hearsay. The Fifth Circuit affirmed the conviction. United States v. Hernandez, _____F.2d 7569 (5th Cir. June 1, 1981).

The facts, viewed in the light most favorable to the government, show that Hernandez' co-defendant, Adrian Koutrumbas, contacted Lowell Miller, an undercover agent for the Drug Enforcement Administration, to discuss the sale of methaqualone tablets. Several discussions and meetings ensued during which Koutrumbas gave Miller some sample tables and Miller agreed to purchase 50,000 pills.

During the trial of the instant case, Hernandez took the stand in his own defense. He testified that Koutrumbas asked him on April 5, 1979 to load three gifts onto his

truck which were to be delivered to some friends later that day. Koutrumbas said that the packages contained Greek statutes. Hernandez never knew Koutrumbas prior to their telephone conversation and they had never conducted business together prior to April 5, 1979.

As to Hernandez' knowledge of the true contents of the packages, he testified on direct examination as follows:

Q. And did Mr. Miller ask you a question whether you had knowledge of what was in those boxes?

A. He asked me, "You know what's in those boxes?" And I had-I believe, sir, that I said, "I think so."

Q. Had the boxes ever been opened and shown to you?

A. No, sir. The gifts were never-when I delivered the gifts to Mr. Miller, they were never opened in front of my eyes.

Q. Now, thinking back, what was your thought as to the contents of those boxes when Agent Miller asked you what was

in them?

A. Greek statutes.

Q. Did you ever have the knowledge or the intent at any time while in Tarpon Springs to distribute any controlled substances?

A. No, sir.

(Record, vol. III at 24-25).

On cross examination, the Assistant United States Attorney pressed appellant on his familiarity with quaaludes or methaqualone:

Q. Have you ever seen methaqualone before?

A. I've seen-yes, I've seen pills-yes-but no distinction. I couldn't-

Q. Do you know what is commonly termed or called a "quaalude"?

A. I've heard of the word.

Q. Did you hear your counsel ask witnesses today and yesterday about tablets with markings "Rorer 714" on them?

A. Yes, ma'am.

Q. And he asked that in asking them

to describe a methaqualone tablet with "Rorer 714" on it, do you recall that?

A. Vaguely, yes, ma'am.

Q. Have you ever seen a white tablet with "Rorer 714" marked on it?

A. Yes, I might have seen a white tablet. The markings I could not tell you about.

Q. Did you see any white tablets on April 5th, 1979?

A. No, ma'am.

Q. No white tablets at all?

A. No, ma'am.

Q. Is it your testimony that you saw no methaqualone or quaalude tablets on that day in question?

A. On April the 5th, ma'am?

Q. Yes.

A. No, ma'am.

Q. Mr. Hernandez, if you saw them, would you recognize them?

A. No, ma'am.

MRS. COLE: May it please the Court-

BY MRS. COLE:

Q. Mr. Hernandez, have you ever had any methaqualones or quaaludes in your possession?

MR. ENGEL: I'm going to object to that. He doesn't-I'm going to tell him to take the Fifth Amendment at this time. I'm going to ask for a mistrial. She's asking him if he ever had something at some prior occasion that might constitute a crime before this Court and Jury.

I'm making a motion for mistrial, Your Honor. I would like to approach the Side-bar. (Record, vol. III at 68-70). At this point, a bench conference was held. The trial court ruled that the question was a proper one for cross-examination but agreed with defense counsel that it was broad enough in scope to permit the appellant to invoke his Fifth Amendment privilege against self-incrimination; however, he denied appellant's motion for a mistrial. The government agreed to withdraw the question and phrase it more narrowly. The cross-examination continued:

BY MRS. COLE:

Q. Mr. Hernandez, on April 5th, 1979, did you have in your possession tablets of methaqualone or quaaludes?

A. I might have had them, but I wasn't of knowledge of it.

Q. Did you ever have possession of methaqualone tablets or quaaludes in your possession on April 5th other than what has been the subject-other than what was included in the boxes entered as Government's evidence 3-A, 3-B, and 3-C?

A. I might have had, but no knowledge of it.

(Record- vol. III at 75-76).

To impeach Hernandez' testimony, the government then produced the briefcase that was illegally seized from his truck. The District Court overruled the objections made by Hernandez' attorney that the production and admission into evidence of the illegally seized briefcase and its contents was improper on the ground that they were not proper

vehicles for impeachment.

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. IV:

The right of the people to be secure in their . . . effects, against unreasonable searches and seizures, shall not be violated . . .

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN Agnello v. United States, 269 U.S. 20 (1925), AND SUBSEQUENT CASES AS IT ALLOWS THE ADMISSION OF ILLEGALLY SEIZED EVIDENCE TO CONTRADICT THE DEFENDANT'S TESTIMONY WHEN SUCH TESTIMONY IS ELICITED BY CROSS-EXAMINATION WHICH IS ONLY TANGENTIALLY RELATED TO MATTERS TESTIFIED TO ON DIRECT EXAMINATION.

The Fourth Amendment to the Constitution guarantees the right "to be . . . secure against unreasonable searches and seizures." One of the rules providing for the Fourth Amendment's guarantee is the rule govern-

ning the admission of evidence illegally seized and otherwise subject to suppression for purposes of impeaching the Defendant's trial testimony. The central inquiry in determining the admissibility of the illegally seized evidence is whether the cross-examination that elicits the statements to be impeached by the illegal evidence is itself "proper", i.e. whether it is sufficiently related to the testimony resulting from direct examination. The purpose of the rule is to prevent illegally seized evidence from being "smuggled into evidence by the prosecutor on cross-examination." United States v. Havens, 592 F.2d 848, 851 (5th Cir. 1979).

The major Supreme Court cases dealing with the admission of illegally seized evidence for impeachment purposes have not been consistent. In Agnello v. United States, 269 U.S. 20 (1925), the government asked the Defendant on cross-examination whether he had ever seen cocaine before. The objection to the question made by the

Defendant's attorney was overruled and the Defendant replied "No". The government then introduced into evidence a container of cocaine which had been illegally seized from the Defendant's apartment. This container had been excluded from the government's case-in-chief. This Court reversed the conviction, holding that the cross-examination which elicited the testimony allowing the illegally seized evidence to be admitted was not justified, as Agnello did not testify about the container of cocaine on direct examination. The Court cited the statement in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used by the Court, but that it shall not be used at all." Supra, at 392.

As was true in Agnello, the admission of the evidence obtained by the illegal search and seizure in the instant case was done in

error and is prejudicial to Hernandez' rights. As this Court recently stated in United States v. Havens, 446 U.S. 620 (1980):

> A Defendant's statements made in response to proper cross-examination reasonably suggested by the Defendant's direct examination are subject to the otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt. Supra, at 627.

In the instant case, the illegal evidence was introduced by an improper line of cross-examination. The prosecutor was allowed to range too far afield from matters testified to on direct examination. The prosecutor clearly exceeded the liberal limits established for cross-examination of the Defendant. The cross-examination dealt with the mere possession by Hernandez of some pills separate and apart from the 49,000 pills which he stands convicted of intending to distribute. Even if Hernandez

knew about the small quantity of pills in the briefcase, such knowledge does not impart knowledge to him of the 49,000 pills in the packages. The relationship between what Hernandez testified to on direct examination and what the government used to impeach was very tenuous and admitted of a number of possibilities consistent with Hernandez' innocence.

Agnello was modified by Walder v. United States, 347 U.S. 62 (1954), where the Defendant stated on direct examination that he never purchased, sold or possessed any narcotics. This Court held that illegally seized evidence could be admitted for impeachment purposes, after the government was allowed to cross-examine the Defendant about heroin illegally seized from his home two years before. Agnello was apparently distinguished on the ground that the evidence admitted against the Defendant Walder was unrelated to the crime charged. Walder is distinguishable from the instant case, however, since the Defendant in that case

expressly stated on direct examination that he had never purchased, sold or possessed any narcotics. In the instant case, Hernandez only replied that he did not know that the gift-wrapped packages contained methaqualone. He never expressly denied possession of the pills in the briefcase. As a result, the cross-examination was improper as the questions were not sufficiently related to the Defendant's testimony elicited on direct examination.

In Harris v. New York, 401 U.S. 222 (1971), this Court upheld the admission of certain statements of the accused taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), to impeach contradictory testimony given by the accused. In so doing, this Court held that Walder was not limited to impeachment by collateral matters and that a Defendant's testimony could be impeached by matters directly related to the crime charged. This Court emphasized that an accused is under the same obligation

to tell the truth as any other witness and that his credibility may be impeached by prior inconsistent statements.

In the instant case, the Defendant made no prior inconsistent statements, as he only stated on direct examination that he did not intend to distribute quaaludes. The government's cross-examination, however, dealt with the Defendant's possession of some pills other than the 49,000 pills he was alleged to have distributed.

This Court's most recent case dealing with the use of illegally seized evidence to impeach a Defendant's testimony is United States v. Havens, 446 U.S. 620 (1980). In that case, a quantity of cocaine was found inside the pockets sewn into an undershirt worn by one McLeroth, a traveling companion of Havens. DEA agents then illegally seized a tee shirt from which pieces had been cut out. The missing pieces matched the pockets sewn to McLeroth's tee shirt. On direct testimony, Havens denied wrap-

ping the material around McLeroth's body. On cross-examination, Havens denied having a tee shirt with pieces of cloth missing. On rebuttal, the District Court admitted into evidence the tee shirt seized from Haven's luggage for purposes of impeachment even though it had been excluded from the government's case-in-chief. This Court held that the cross-examination of Havens was proper in view of his denial on direct examination that he engaged in draping material around McLeroth's body.

The inquiry after Havens is whether the cross-examination which elicits the statements to be impeached by the illegally seized evidence is within the scope of the direct evidence. The cross-examination in the instant case is not within the scope of the direct evidence since, unlike, Harris, there were no contradictory statements and, unlike Havens, there was no contradictory behavior. The relationship between what Hernandez testified to on direct examination and what the government used to impeach was

too tenuous and admitted of numerous possibilities consistent with Hernandez' innocence.

The facts in the instant case can be easily distinguished from both Agnello and Havens. The specific question on cross-examination in the instant case-whether Hernandez possessed pills other than those contained in the gift-wrapped packages-has a closer nexus with Hernandez' direct testimony than the broad question in Agnello. The question in that case was whether the Defendant had ever seen cocaine before. The question in the case at bar, however, does not have the requisite nexus to the direct testimony, as did the questions in Havens. In Havens, the direct examination and cross-examination both directly concerned the material that was wrapped around McLeroth's body. In contrast, the direct testimony in the instant case only concerned Hernandez' knowledge of the contents of the packages, and his intent to distribute controlled substances. The testimony which was elicited on cross-examination, however, concerned

his possession of pills other than what was contained in the packages. Such overreaching cross-examination violates fundamental fairness. Here, the prosecutor can manipulate the course of the trial by admitting otherwise suppressed evidence by his own devious questioning. As the dissenting opinion in Havens pointed out, even the moderately talented prosecutor can "work in" evidence on cross-examination that could not otherwise be introduced in the case in chief. The instant case is an example of a situation where the cross-examination is so unrelated to testimony elicited on direct examination that such cross-examination cannot be said to be anything but improper.

This Court should grant certiorari to reaffirm its mandate in Agnello v. United States, Supra, and later cases, that a Defendant's testimony on direct examination can be impeached only if the cross-examination is proper and reasonably suggested by

the Defendant's direct examination.

II. THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR A MISTRIAL AS THE GOVERNMENT, THROUGH ITS IMPROPER LINE OF QUESTIONING, FORCED THE DEFENDANT TO EITHER INCRIMINATE HIMSELF OR CLAIM HIS FIFTH AMENDMENT PRIVILEGE.

In asking Hernandez whether he ever had any methaqualone or quaaludes in his possession, the government was attempting to influence the jury by building its case on inferences. Such methodology is improper. See Robinson v. Smith, 451 F. Supp. 1278 (DC N.Y. 1978). Whether the Defendant ever possessed methaqualone or quaaludes is not relevant to having possession of such on April 5, 1979. A Defendant's familiarity with, and possession of, drugs on other occasions may naturally bear some degree of relevance to the issue of his involvement in a drug transaction on a given occasion. It does not follow, however, that

because one may be aware of the nature of contraband generally, that one is also aware of the concealed contents of a certain package. Such reasoning was, nevertheless, the premise for the government's line of questioning.

Although the Defendant did not actually refuse to testify based on his Fifth Amendment privilege, he was nevertheless prejudiced by the government's line of questioning. He was not given the opportunity to invoke his Fifth Amendment privilege, as the government rephrased the question. The damage was done, however, since in asking the question in the manner it did, thereby forcing counsel for the Defendant to invoke his Fifth Amendment privilege, the government prosecutor in effect, obliquely commented upon the defendant's invocation of his Fifth Amendment privilege and his concomitent failure to testify. See United States v. Brown, 546 F.2d 166 (5th Cir. 1977).

This Court should grant certiorari to reaffirm its mandate that those accused of criminal activity will not be prejudiced by the prosecution's attempt to build its case on totally unwarranted inferences.

III. UNDER THE STANDARD FOR ADMITTING CO-CONSPIRATOR HEARSAY ESTABLISHED IN UNITED STATES V. JAMES, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), THERE WAS INSUFFICIENT INDEPENDENT PROOF NECESSARY TO ESTABLISH A CONSPIRACY AND THE DEFENDANT'S PARTICIPATION THEREIN.

The government failed to prove both criminal knowledge and intent by Hernandez, as well as his participation in an illegal agreement with Koutrumbas. Hernandez had never dealt with Koutrumbas prior to their April 5th meeting. Hernandez could not have known the true contents of the packages as he was told the contents were Greek statues, and, in fact, the packages were gift-wrapped. These facts indicate a lack of criminal knowledge and intent on Hernandez' part.

Given the relationship between Hernandez and Koutrumbas, it is evident that the jury could have reasonably concluded that Hernandez was present to assist Koutrumbas in the operation of a perfectly legitimate transaction. The government proved no more than Hernandez' mere association with Koutrumbas; mere association cannot support a conspiracy charge. Roberts v. United States, 416 F.2d 1215 (5th Circuit 1969).

Under James and United States v. Nixon, 418 U.S. 683, the facts as recited in the instant case do not constitute sufficient evidence, independent of the hearsay itself, to show that a conspiracy existed and that Hernandez and Koutrumbas were members of such a conspiracy. This Court should grant certiorari to review this abrogation of a Defendant's fundamental right to be protected from the use of hearsay against him when the requisite conditions for the admission of such hearsay have not been met.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HENRY ROTHBLATT
155 So. Miami Avenue
Suite 1111
Miami, Florida 33130
(305) 374-3770
Counsel for Petitioner

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-5684

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY HERNANDEZ, Appellant

Appeal from the United States District Court for the Middle District of Florida at Tampa.

Wm. Terrell Hodges, District Judge

Decided: June 1, 1981

Before Morgan, Anderson, and Clark, Circuit Judges.

R. Lanier Anderson, III, Circuit Judge:

Appellant Anthony Hernandez was convicted of three counts: conspiracy to possess me-

thaqualone (a Schedule II controlled substance) with intent to distribute in violation of 21 U.S.C.A. §§841 (a)(1) and 846 (1972), possession with intent to distribute methaqualone in violation of 21 U.S.C.A. §841 (a)(1) (1972), and distribution of methaqualone in violation of 21 U.S.C.A. §841 (a)(1) (1972). Appellant asserts four errors: (1) the district court erred in admitting evidence which had been illegally seized and ordered suppressed. The court admitted the evidence for the limited purpose of impeachimg or rebutting appellant's trial testimony; (2) the district court erred in not declaring a mistrial when the prosecutor's questions allegedly forced appellant's counsel to advise appellant, in the presence of the jury, to assert the privilege against self-incrimination; (3) the court erred in admitting co-conspiratorial hearsay without satisfying the United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836,

61 L.Ed 283 (1979), standard; and (4) insufficiency of the evidence to support the conviction. We affirm the judgement of the district court.

I. FACTS

The facts, viewed in the light most favorable to the government, show that appellant's co-defendant Adrian Koutrumbas[1] contacted Lowell Miller, an undercover agent for the Drug Enforcement Administration, to discuss the sale of a quantity of quaalude (methaqualone, a Schedule II controlled substance) tablets. Several discussions and meetings ensued. Finally, on March 29, 1979, Koutrumbas arranged to meet with agent Miller at the Greek Village Restaurant in Tarpon Springs, Florida. During the meeting, Koutrumbas gave Miller three sample tablets of methaqualone and Miller agreed to purchase 50,000 pills. On April 4, Koutrumbas told Miller that his friend from Miami had brought the tablets into town and they were ready to

1. Koutrumbas was tried separately.

close the deal. The purchase was arranged for the following day, April 5, at 4:00 p.m. at the Greek Village Restaurant.

The exchange actually took place at the Deep Disco Lounge located a short distance from the Greek Village Restaurant. The agents met Hernandez in the rear of the Deep Disco. During the meeting, appellant retrieved three decoratively-wrapped packages from his pick-up truck and put them in the agent's car. As he did so he said as to the first package, "this is for your mother," and then, "this is for your father." The agents also testified that he pointed to the packages and said, "twenty-four, twenty-four, and one," indicating the total number of 49 or 49,000 tablets, the agreed upon quantity purchased. The packages were later found to contain 49,000 quaaludes. Thereupon the agents placed appellant and Koutrumbas under arrest. Following the arrest, Agent Miller asked appellant whether he knew what was in the packages, to which he replied, "yeah."

Following the arrest, the agents seized a briefcase from appellant's truck. The briefcase contained a variety of pills, some of which were quaaludes like the ones in the packages. The district court, however, ordered the briefcase and its contents suppressed as the products of an illegal search and seizure.

During the trial appellant took the stand in his own defense. He testified that he lived in Hialeah, Florida, and was employed as a sales representative for a seafood supplier. He testified that he left Hialeah at about 5:00 a.m. on April 5 and drove to Tarpon Springs to meet Koutrumbas to discuss the possibility of supplying Koutrumbas and his associates with seafood on a regular basis. He testified that he spent the afternoon with Koutrumbas, that Koutrumbas had asked him to load into his truck three "gifts" to be delivered to some friends later that day, and that Koutrumbas said that the packages contained Greek statues which were

too heavy for him to lift due to his bad back. The gifts turned out to be three packages of quaaludes. Later in the afternoon, appellant and Koutrumbas returned to the Greek Village Restaurant, but Koutrumbas directed appellant to park his truck in the rear of the Deep Disco Lounge. When the agents arrived, Koutrumbas asked appellant to give the "gifts" to his "friends." Appellant admitted to "ad libbing" as he transferred the packages from his truck to the agent's car, saying this is for your mother and father, but denied mentioning a series of numbers during the exchange. As to his knowledge of the true contents of the packages, he testified on direct examination as follows:

Q. And did Mr. Miller ask you a question whether you had knowledge of what was in those boxes?

A. He asked me, "You know what's in those boxes?" And I had-I believe, sir, that I said, "I think so."

Q. Had the boxes ever been opened and shown to you?

A. No, sir. The gifts were never-when I delivered the gifts to Mr. Miller, they were never opened in front of my eyes.

Q. Now, thinking back, what was your thought as to the contents of those boxes when Agent Miller asked you what was in them?

A. Greek statues.

Q. Did you ever have the knowledge or the intent at any time while in Tarpon Springs to distribute any controlled substances?

A. No, sir.

(Record, vol. III at 24-25).

On cross-examination, the Assistant United States Attorney pressed appellant on his familiarity with quaaludes or methaqualone:

Q. Have you ever seen methaqualone before?

A. I've seen-yes, I've seen pills-yes-but no distinction. I couldn't-

Q. Do you know what is commonly termed or called a "quaalude"?

A. I've heard of the word.

Q. Did you hear your counsel ask witnesses today and yesterday about tablets with markings "Rorer 714" on them?

A. Yes, ma'am.

Q. And he asked that in asking them to describe a methaqualone tablet with "Rorer 714" on it, do you recall that?

A. Vaguely, yes, ma'am.

Q. Have you ever seen a white tablet with "Rorer 714" marked on it?

A. Yes, I might have seen a white tablet. The markings I could not tell you about.

Q. Did you see any white tablets on April 5th, 1979?

A. No, ma'am.

Q. No white tablets at all?

A. No, ma'am.

Q. Is it your testimony that you saw no methaqualone or quaalude tablets on that day in question?

A. On April the 5th, ma'am?

Q. Yes.

A. No, ma'am.

Q. Mr. Hernandez, if you saw them, would you recognize them?

A. No, ma'am.

MRS. COLE: May it please the Court-

BY MRS. COLE:

Q. Mr. Hernandez, have you ever had any methaqualones or quaaludes in your possession?

MR. ENGEL: I'm going to object to that. He doesn't-I'm going to tell him to take the Fifth Amendment at this time. I'm going to ask for a mistrial. She's asking him if he ever had something at some prior occasion that might constitute a crime before this Court and Jury.

I'm making a motion for mistrial, Your Honor. I would like to approach the Sidebar.

(Record, vol. III at 68-70). At this point, a bench conference was held. The trial court ruled that the question was a proper one for cross-examination but agreed with defense counsel that it was broad enough in scope

to permit the appellant to invoke his Fifth Amendment privilege against self-incrimination; however, he denied appellant's motion for a mistrial. The government agreed to withdraw the question and phrase it more narrowly. The cross-examination continued:

BY MRS. COLE:

Q. Mr. Hernandez, on April 5th, 1979, did you have in your possession tablets of methaqualone or quaaludes?

A. I might have had them, but I wasn't of knowledge of it.

Q. Did you ever have possession of methaqualone tablets or quaaludes in your possession on April 5th other than what has been the subject-other than what was included in the boxes entered as Government's evidence 3-A, 3-B, and 3-C?

A. I might have had, but no knowledge of it.

(Record, vol. III at 75-76).

The government then produced the briefcase seized from appellant's truck. He identi-

fied the briefcase as his and admitted that white tablets bearing the inscription "Rorer 714" were his sleeping pills. Furthermore, on rebuttal a DEA agent, Baggett, testified that the tablets had been seized from appellant's truck and were identical in physical appearance and inscription to the tablets in the three packages. Appellant's attorney objected several times to the production and admission into evidence of the briefcase and its contents on the ground that they were not proper vehicles for impeachment. The district court overruled all of his objections.

II. DISCUSSION

A. Admissibility of illegally seized evidence for purpose of impeachment.

[1] The rule governing the admission of evidence illegally seized and otherwise subject to suppression for purposes of impeaching the accused's trial testimony has experienced a lengthy evolutionary process. It is appropriate to examine in some detail the

prominent Supreme Court decisions on this subject because the facts in this case highlight the tension between the first decision on the subject and the most recent.

In Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925), the defendant took the stand and denied any knowledge of the contents of the packages which he was carrying. They actually contained cocaine. On cross-examination, the government asked the defendant wether he had ever seen cocaine before. Defendant's attorney objected to the question but the objection was overruled and defendant replied "No." The government then introduced into evidence a can of cocaine which had been illegally seized from defendant's apartment and which had been excluded from the government's case-in-chief. The Supreme Court reversed Agnellos' conviction:

[T]he contention that the evidence of the search and seizure was admissable in rebuttal is without merit. In his direct exami-

nation, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained in the search. As said in Silverthorne Lumber Co. v. United States, 251 U.S. [385] 392, 40 S.Ct. 182, 64 L.Ed. [319] 322, 24 AL.R. 1426: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." The admission of evidence obtained by the search and seizure was error, and prejudicial to the substantial rights of Frank Agnello. 269 U.S. at 35, 46 S.Ct. at 7. On the basis of Agnello alone, we might hold that the admission of evidence seized from appellant's briefcase was error. Not only do the facts in this case closely parallel those in

Agnello, but the sweeping statement that illegally seized evidence should not be used at all would seem to foreclose the use of evidence in this case; however, this latter statement has been rejected and Agnello otherwise limited. See United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed. 2d 559 (1980).

The first case to modify Agnello is Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), where the defendant, accused of narcotics sales, made the sweeping statement on direct examination that he had never purchased, sold or possessed any narcotics. The government was allowed to cross-examine about heroin illegally seized from his home two years before. At that time the evidence had been suppressed. The trial court instructed the jury that the evidence was admitted for the limited purpose of impeaching the defendant's credibility. The Supreme Court held that the admission of the evidence was proper. The Court reasoned

that the exclusionary rule was never intended as a shield for the defendant to make sweeping untrue statements without fear of contradiction. The Court appeared to distinguish Agnello on the ground that the evidence admitted against Walder was unrelated to the crime charged. See 3 W. LaFave Search and Seizure § 11.6 (1978).

The next case was Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), where the trial court admitted certain statements of the accused taken in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) to impeach the accused's contradictory trial testimony. The Supreme Court held that Walder was not limited to impeachment by collateral matters. A defendant may be impeached by matters bearing directly on the crimes charged. The court emphasized that while an accused has the right to testify in his own behalf, he is under the same obligation as any other witness to tell the truth and that his cre-

dibility may be impeached by prior inconsistent statements. The majority rejected the argument that the admission of the statements would undermine the purpose of the exclusionary rule: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225, 91 S.Ct. at 645.

Finally, in United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed. 2d 559 (1980), the defendant and a travelling companion, McLeroth, entered the Miami International Airport on a flight from Peru. Havens cleared Customs, but McLeroth was detained and searched. The search revealed a quantity of cocaine in pockets sewn into his undershirt. McLeroth implicated Havens in the scheme to smuggle in the cocaine. DEA agents then arrested Havens and searched his luggage, without a warrant. The agents found a tee shirt from which pieces had been cut that

matched the pockets sewn to McLeroth's tee shirt; however, the tee shirt and other evidence were suppressed. McLeroth pleaded guilty to one count of the indictment and testified for the government at Havens' trial. Havens took the stand in his own defense. His testimony on direct was as follows:

"Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?

"A. Yes, I did.

"Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?

"A. I did not." App.34.

On cross-examination, Havens testified as follows:

"Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything

involving Mr. McLeroth; is that correct?

"A. I don't-I said I had nothing to do with anything with McLeroth in connection with this cocaine matter.

"Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

"A. Absolutely not.

"Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38-40 medium tee shirts?" App.35.

An objection to the latter question was overruled and questioning continued:

"Q. On that day, sir, did you have in your luggage a Size 38-50 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

"A. Not to my knowledge.

"Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975[sic]?

"A. Not to my knowledge. No." App. 46. 446 U.S. at 622, 100 S.Ct. at 1914, 64 L.Ed. 2d. at 563.

On rebuttal, the district court admitted into evidence the tee-shirt seized from Havens' luggage and instructed the jury to consider it only for impeaching his credibility. The jury found Havens guilty. This court reversed. United States v. Havens, 592 F.2d 848 (5th Cir. 1979). In Havens, this court distilled two requirements from Agnello and Walder regarding the use of illegally seized evidence to impeach the accused's trial testimony. First, the evidence must be offered to contradict a particular statement made by the accused during direct examination. "It cannot be smuggled into evidence by the prosecutor on cross-examination." Id. at 851. Second, the evidence must contradict a particular statement made by the accused. We held that the testimony in Havens did not satisfy that test.

The Supreme Court reversed our decision in

Havens. The Court noted that Agnello had been limited. The Court rejected the rule that illegally seized evidence may be used to impeach only defendant's direct testimony. The obligation to testify truthfully adheres to testimony given on proper cross-examination no less than to testimony on direct examination. The Court held:

> [T]hat a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.

446 U.S. at 627, 100 S.Ct. at 1917, 64 L.Ed. 2d at 566. The Court then held that the cross-examination of Havens was entirely proper in view of his denial on direct examination that he engaged in draping material aound McLeroth's body.

Therefore, after Havens, the proper inquiry is whether the cross-examination which elicits the statements to be impeached by the illegally seized evidence is "proper," i.e., whether it is within the scope of the direct evidence.

Before we can apply the Havens standard to this case, we must resolve a dilemma posed by Agnello. Although Agnello has been practically eviscerated by subsequent decisions, it has not been overruled. The facts in Agnello are very similar to the facts in this case. In each case on direct examination the defendant simply denied any knowledge of the contents of the package which he was charged with possessing. On cross-examination, the prosecution inquired into the defendant's familiarity with the drug at issue, and in the instant case asked a more particular question, i.e., whether the defendant had possessed any of the quaalude tablets on the day in question. When the defendant denied any knowledge of drugs, the government intro-

duced other drugs seized from the defendant's possession to impeah his credibility. In Agnello, the drugs came from defendant's residence, while in this case the drugs came from appellant's briefcase found in his truck. In Agnello, the Court held that the defendant had done "nothing...to justify cross-examination in respect of the evidence claimed to have been obtained by the search." 269 U.S. at 35, 46 S.Ct. at 7. While we might conclude that the Havens analysis supplants Agnellos's holding, Havens seems to reaffirm Agnello with respect to its particular facts. The majority stated, "The implication of Walder is that Agnello was a case of cross-examination having too tenuous a connection with any subject opened upon direct examination to permit impeachment by tainted evidence."[2]

2. The facts in our case actually fall somewhere between Agnello and Havens. The narrow question on cross-examination-whether the appellant possessed other quaalude tablets than the ones contained in the packages on the day in question-has a closer nexus with the appellant's direct testimony than the broad question in Agnello-whether the defendant had ever

446 U.S. at 625, 100 S.Ct. at 1916, 64 L.Ed. 2d at 565. In view of the force of Havens and its criticism of Agnello, however, a disposition of this case solely on the basis of its factual similarity with Agnello would be precarious. The majority's lip service to Agnello might best be viewed as an attempt to reconcile prior cases, rather than an endorsement of Agnello's holding. We find it significant that the Havens dissenters pointed out that the Agnello holding could not stand up under the Havens test, and that the Agnello evidence would have been admissible under the Havens analysis: "[t]he cross-examination about Agnello's previous connection with cocaine was reasonably related to his direct testimony that he lacked knowledge that the commodity he was transporting was cocaine." 446 U.S. at 630, 100 S.Ct. at 1918, 64 L.Ed. 2d at 568 (Brennan, J., dissenting). We find it significant that the dissent apparseen cocaine before. The question, however, does not have as close a nexus to the direct testimony as the questions in Havens.

ently made no impression the Havens majority. Therefore, we proceed to an independent analysis of the instant facts under the Havens standard.

[2, 3] On direct examination, appellant denied any knowledge that the packages contained methaqualone. Instead he testified that he believed the packages contained Greek statues. The questions posed in cross-examination inquired into appellant's familiarity with drugs, specifically methaqualone. Whether the defendant was familiar with the drug methaqualone certainly related to appellant's knowledge of the contents of the packages. We can conclude that the question was reasonably suggested by appellant's direct testimony. The more specific question concerning appellant's possession of quaalude tablets on the day in question even more clearly related to his knowledge of the contents of the packages. That question was also reasonably suggested by his denials on direct examination. Appellant's responses on cross-exami-

nation-that he had not seen a quaalude tablet on the day in question and, if he had possessed any that day, he had no knowledge thereof-were contradicted by the evidence seized from his briefcase. Therefore, the admission of the illegally seized evidence for purposes of impeaching appellant's trial testimony was not error.[3]

B. Defendant's counsel's reference to the Fifth Amendment privilege during the government's cross-examination.

[4] Appellant complains that the government asked questions calculated to force appellant to invoke his Fifth Amendment privilege against self-incrimination, and attempted to build its case upon impermissible inferences to be drawn therefrom. We find

3. Appellant also argues that even assuming that the illegally seized evidence was admissible for impeachment purposes, its probative value was substantially outweighed by its prejudicial effect and should have been excluded. Fed.R.Evid 403. Having reviewed the record, we do not believe that the district court abused its discretion under Rule 403 in admitting the evidence. See United States v. Benton, 637 F.2d 1052 (5th Cir. 1981).

no merit in this argument. The exchange in question occurred when the government asked appellant on cross-examination whether he had ever possessed methaqualone or quaaludes. Appellant's attorney, in the presence of the jury, objected and stated that he would advise his client to take the Fifth Amendment. Appellant himself never invoked the privilege or answered the question. The question was withdrawn and rephrased, and the trial court instructed the jury to disregard any comments of counsel made regarding the question.

Before addressing the merits of the alleged error, we do not believe that defense counsel should be allowed to put potentially prejudicial material before the jury in this manner and then assert error on appeal. Assuming that the government's questioning did entitle appellant to invoke his Fifth Amendment privilege, the proper course would be to object to the question and take the matter up outside the presence of the jury. In

this manner, any mention of the privilege against self-incrimination in the presence of the jury might be avoided in this case.

[5-7] Assuming that the reference to the Fifth Amendment in the jury's presence was unavoidable and that appellant's counsel's statement that he would advise his client to invoke the privilege is equivalent to the client actually invoking the privilege, there was no error. It is true that the prosecution may not build its case on the misleading and unfair inferences which the jury may draw from a witness who invokes the privilege against self-incrimination by calling to the stand a witness whom the prosecution knows will assert the privilege. See, e.g., Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963). However, the rule is different where the government cross-examines the accused who takes the stand in his defense.

> [W]hen a defendant has voluntarily waived his Fifth Amendment privilege by testifying

> in his own behalf, the rationale for prohibiting privilege-invoking queries on cross-examination does not apply. The defendant has chosen to make an issue of his credibility; he has elected to take his case to the jury in the most direct fashion. The government, accordingly, has a a right to challenge the defendant's story on cross-examination... The government may impeach the defendant by developing inconsistencies in his testimony; the government may also successfully impeach him by asking questions which he refuses to answer. If the refusals could not be put before the jury, the defendant would have the unusual and grossly unfair ability to insulate himself from challenges merely by declining to answer embarassing questions. He alone could control the presentation of evidence to the jury.

United States v. Hearst, 563 F.2d 1331, 1341-42 (9th Cir. 1977), cert. denied 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978)

(citation omitted). To the same effect, see also United States v. Beechum, 582 F.2d 898, 907-09 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244,59 L.Ed.2d 472 (1979) (citing Hearst with approval). The prosecutor's range of inquiry is not unlimited. The government's questions must be "reasonably related" to the subjects covered by the defendant's direct testimony. McGautha v. California, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471,28 L.Ed.2d 711 (1971); Brown v. United States, 356 U.S. 148, 78 S.Ct. 713, 2 L.Ed.2d 758 (1958); United States v. Hearst, supra. Whether appellant had ever possessed methaqualone or quaaludes before is reasonably related to his direct testimony that he did not know what was in the packages and did not intend to distribute controlled substances. Specifically, if he had possessed them and was familiar with them, it would tend to discredit his claimed ignorance of the contents of the packages. We believe that the question was proper. Appellant had waived

his privilege by taking the stand and neither appellant nor his attorney was entitled to invoke the privilege in response to the question.[4] United States v. Hearst, supra; "Any prejudice deriving from the invocation of the privilege is therefore attributed to [appellant's] decision to testify." United States v. Beechum, 582 F.2d at 909. Furthermore, any prejudice was more than overcome by the withdrawal of the question and the curative instruction of the trial court.

C. Admission of co-conspiratorial hearsay and sufficiency of the evidence.

[8] Appellant complains that there was insufficient independent evidence of a conspiracy and his participation therein to admit into evidence Koutrumbas' hearsay statements to the agents under the standard for admit-

4. Although the district judge correctly ruled that the question was proper, he also ruled, incorrectly, that appellant was entitled to assert his privilege against self-incrimination. Appellant cannot benefit from the district court's erroneous ruling. "[I]f the court had ruled correctly and not allowed him to invoke the Fifth Amendment, he could have

ting co-conspirator hearsay established in United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct.2836, 61 L.Ed.2d 283 (1979). We have reviewed the record and conclude that the statements were properly admitted. Likewise, there was sufficient evidence to support the conviction. The district court did not err in denying appellant's motion for a judgement of acquittal.

For the foregoing reasons, appellant's conviction is

AFFIRMED.

THOMAS A. CLARK, Circuit Judge, dissenting:

Respectfully, I dissent. The only permissible theory of revelance underlying the introduction of the suppressed evidence was to contradict the defendant's testimony on cross-examination, to the effect that he did not knowlingly possess quaaludes on the day in question. Once he had said that, the door

refused to respond only on peril of contempt." United States v. Beechum, 582 F.2d at 909.

was open for impeachment by the introduction of the suppressed evidence. I believe, however, that Hernandez was brought to this admission by an improper line of cross-examination. The prosecutor was allowed to range too far afield from matters testified to on direct, as a consequence of which Hernandez was forced either to claim his fifth amendment privilege or to explain as best he could matters that were unrelated both to the offense charged and to what he had testified to on direct. Had the prosecutor been confined to "proper cross-examination reasonably suggested by the defendant's direct examination," United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 1917, 64 L.Ed.2d 559 (1980), Hernandez would not have been forced to make a choice that had an all too predictable outcome.

Of course a defendant's familiarity with and possession of drugs on other similar occasions may bear some degree of relevance to the issue of his involvement in a drug trans-

action on a given occasion, whether it is knowing or innocent. But it simply does not follow that because one may be aware of the nature of certain contraband generally that one also is aware of the concealed contents of a certain package, and yet this was the premise for the government's line of cross-examination. The probative value of information concerning any other instances of knowing possession of contraband similar to that actually transferred is simply "outweighed by the danger of unfair prejudice" and therefore should have been inadmissible under F.R.E. 403.

Before the adoption of the Federal Rules of Evidence and Rule 403, inquiry would have focused on whether the matters the government asked about-whether the defendant had ever been in possession of any other similar contraband-were "collateral" to the facts in issue as to which Hernandez testified on direct-that he was unaware of the true contents of the packages he transferred. Under

the prevailing test the issue would have been whether "the fact, as to which error is predicated, [i.e., Hernandez' possession of the pills in his briefcase could] have been shown in evidence for any purpose independently of the contradiction?" Weinstein's Evidence, paragraph 607[05], quoting from 3 Wigmore, Evidence § 1003 at 657 (3d ed. 1940). Under this test matters would not be collateral that were (1) material to facts in issue and (2) facts independently admissable for impeachment purposes. Id. As for (1), knowing possession of what is in one's own bag bears no material relation to knowledge of what is in another package, and as for (2), F.R.E. 608(b) expressly bars proof by extrinsic evidence of similar bad acts for purposes of impeaching testimony concerning the conduct in question. These limits on the impeachment use of collateral evidence are carried forward in the balancing of probative value vs. danger of unfair prejudice under F.R.E. 403 that the district court should have resolved

against the government's whole line of inquiry. Weinstein's Evidence, paragraph 607 [02].

All agree that an accused should not be allowed to turn the shield of the exclusionary rule into a perjury sword. For this reason it should not matter whether that which is sufficient to dispel the protection of the rule is first elicited by his own lawyer on direct, as in Harris v. New York, 401 U.S. 222, 91 C.Ct. 643, 28 L.Ed.2d 1 (1971), or by government counsel on cross-examination, as in Havens, supra. But there ought to be a substantial connection between what is said and what the government may then seek to prove. Harris involved flatly contradictory statements and Havens contradictory behavior. Here the relationship between what Hernandez testified to on direct and what the government used to impeach was far more tenuous, and indeed admitted of numerous possibilities, however slight, consistent with Hernandez' innocence. To justify today's result on the

strength of Hernandez' direct testimony extends the Harris-Havens rationale farther than I have seen it extended before, overruling Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925), in the process. And long before Hernandez was pushed on cross-examination to what I concede was the point of no return, the district court should have restricted the scope of examination to a more relevant line of inquiry, less susceptible to the danger of unfair prejudice.[1]

1. Thus I agree with the majority that the admission of the pills into evidence, as probative of his by-then highly implausible responses to extended questioning beginning with unrelated involvement with quaaludes, did not violate F.R.E. 403, ante, n.3. But the government could not have reached the question it wanted to ask without asking a great many questions it should not have been permitted to ask.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-5684

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY HERNANDEZ, Appellant

ON PETITION FOR REHEARING

Before Morgan, Anderson, III and Clark, Circuit Judges.

IT IS ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/R. Lanier Anderson, III

Opposition

Office - Supreme Court, U.S.
FILED
NOV 10 1981

No. 81-490

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANN T. WALLACE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government should have been precluded from introducing illegally seized evidence to impeach petitioner's testimony on cross-examination on the ground that the cross-examination exceeded the scope of petitioner's direct testimony.

2. Whether the district court erred in not declaring a mistrial because petitioner's counsel advised petitioner in the presence of the jury to assert the privilege against self-incrimination in response to a cross-examination question.

3. Whether there was sufficient independent evidence of a conspiracy to justify the admission of co-conspirator hearsay statements.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Agnello v. *United States*, 269 U.S. 20 ..... 5, 6, 7

Brown v. *United States*, 356 U.S. 148 8

United States v. *Beechum*, 582 F. 2d 898, cert. denied, 440 U.S. 920 8

United States v. *Havens*, 446 U.S. 620 ..... 5-6, 7

United States v. *Hearst*, 563 F. 2d 1331, cert. denied, 435 U.S. 1000 8

United States v. *James*, 590 F. 2d 575, cert. denied, 442 U.S. 917 9

Constitution and statutes:

United States Constitution:

Fourth Amendment 3

Fifth Amendment 4, 8

21 U.S.C. 841(a)(1) 1

21 U.S.C. 846 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-490

ANTHONY HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1981. A petition for rehearing was denied on July 22, 1981 (Pet. App. 37a). The petition for a writ of certiorari was filed as of August 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possession of methaqualone with intent to distribute, distribution of methaqualone, and conspiracy to possess methaqualone, in violation of 21 U.S.C. 841(a)(1) and 846.

He was sentenced to concurrent terms of four years' imprisonment on each count, to be followed by a five-year special parole term.

The evidence showed that on March 12, 1979, petitioner's co-defendant Koutrumbas[1] contacted DEA undercover Agent Miller to discuss the sale of 50,000 methaqualone tablets, also known as quaaludes (Tr. A26-A34).[2] On March 29, Koutrumbas told Agent Miller that he had a sample of quaaludes and that they should meet at a restaurant (Tr. A37-A38). They met later that day and Agent Miller, after receiving the sample, agreed to buy 50,000 tablets (Tr. A38-A39, A44). On April 4, Koutrumbas told Agent Miller that a friend of his from Miami had brought 50,000 pills into town and was ready to "do the deal" (Tr. A44). They agreed to meet on the following day at a restaurant (Tr. A45).

During the meeting at the restaurant on April 5, Koutrumbas told Agent Miller that there were only 49,000 pills (Tr. A45). Koutrumbas told Agent Miller to drive into an alley behind a disco lounge and to pull up beside a camper vehicle (Tr. A46). When Agent Miller arrived at the camper he was met by petitioner, who handed him a small package and stated that it was "for his son." Petitioner then placed two larger packages in Agent Miller's vehicle, stating that one was for his mother and one was for his father (Tr. A23-A24, A101, B24). After transferring the packages, petitioner pointed to them and stated: "Twenty-four, twenty-four, and one" (Tr. A24, A102). Petitioner and Koutrumbas were then arrested (Tr. A26). After petitioner was advised of his rights, Agent Miller stated: "You knew what was in those packages, didn't you, Tony?" Petitioner responded: "Yeah" (Tr. A53, A157-A158).

---

[1] Koutrumbas was tried separately (Pet. App. 3a n.1).

[2] "Tr." refers to the transcript of the trial.

The agents then seized petitioner's vehicle and inventoried its contents (Hr. 8-9).[3] During the course of the inventory, they opened a briefcase and found seven quaalude tablets (Hr. 10-11). They also found in the cab of the vehicle an opened toilet kit containing a camera and an opaque vitamin bottle filled with quaalude tablets enclosed in a plastic bag (Hr. 11-12, 23). After a hearing prior to trial, the court suppressed the quaaludes found in the kit and the briefcase on the ground that the opening of these containers violated petitioner's Fourth Amendment rights (Hr. 42).

Petitioner testified at trial in his own defense and denied knowing that the package contained quaaludes. He testified that he believed that the packages contained Greek statues (Tr. B22-B25) and that he placed the packages in Agent Miller's car because Koutrumbas had a bad back (Tr. B23). He also denied ever having "the knowledge or the intent at any time while * * * in Tarpon Springs to distribute any controlled substances" (Tr. B25).

On cross-examination of petitioner, the following exchange occurred (Tr. B68-B70):

Q. Have you ever seen methaqualone * * *?

* * * * *

A. I've seen—yes, I've seen pills—yes but no distinction. I couldn't—

Q. Do you know what is commonly termed or called a "quaalude"?

A. I've heard of the word.

* * * * *

Q. Have you ever seen a white tablet with "Rorer 714" marked on it?

---

[3] "Hr." refers to the transcript of the suppression hearing.

A. Yes, I might have seen a white tablet. The markings I could not tell you about.

Q. Did you see any white tablets on April 5th, 1979?

A. No, ma'am.

* * * * *

Q. Is it your testimony that you saw no methaqualone or quaalude tablets on th[e] day in question?

A. On April the 5th, ma'am?

Q. Yes..

A. No, ma'am.

Q. Mr. Hernandez, if you saw them, would you recognize them?

A. No, ma'am.

* * * * *

Q. Mr. Hernandez, have you ever had any methaqualone or quaaludes in your possession?

Defense counsel objected to this question, informed the court in the presence of the jury that he was going to tell his client to take the Fifth Amendment, and requested a mistrial on the ground that the prosecutor was improperly asking the defendant "if he ever had something at some prior occasion that might constitute a crime before this Court and Jury" (Tr. B70). The court found that the question was proper and denied the motion for a mistrial (Tr. B73). The court then informed the jury that the question had been withdrawn and that they were "to disregard altogether the comments made by either lawyer" (Tr. B75). The line of questioning continued as follows (Tr. B75-B76):

Q. Mr. Hernandez, on April 5th, 1979, did you have in your possession tablets of methaqualone or quaaludes?

A. I might have had them, but I wasn't of knowledge of it.

* * * * *

Q. Did you ever have possession of methaqualone tablets or quaaludes in your possession on April 5th other than what has been the subject—other than what was included in the boxes entered as Government's evidence 3-A, 3-B, and 3-C?

* * * * *

A. I might have had, but no knowledge of it.

The prosecutor then asked petitioner to identify his briefcase, which had been found in the truck on April 5, 1979. When asked whether the briefcase contained three white tablets, petitioner responded: "The amount I'm not sure, ma'am. I had some sleeping pills" (Tr. B77-B78). The government then introduced for impeachment purposes the tablets found in the briefcase (Tr. B80).

The court of appeals affirmed (Pet. App. 1a-31a). Judge Clark dissented with respect to the admissibility of the impeachment evidence (*id.* at 31a-36a).

ARGUMENT

1. Relying on *Agnello* v. *United States*, 269 U.S. 20 (1925), petitioner's primary contention (Pet. 9-19) is that the evidence illegally seized from the briefcase could not be used to impeach his testimony on cross-examination. This contention was correctly rejected by the court below. Moreover, its validity turns on whether the cross-examination here exceeded the scope of the direct testimony—a fact-bound issue that does not warrant review by this Court.

In *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980), this Court held that "a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to

otherwise proper impeachment" by illegally seized evidence. As the court of appeals explained (Pet. App. 24a-25a), under this standard the district court correctly permitted the use of the evidence for impeachment purposes. On direct examination, petitioner denied any knowledge that the packages contained quaaludes. He also denied on direct examination having "the knowledge or the intent at any time while * * * in Tarpon Springs to distribute any controlled substances" (Tr. B25). The question on cross-examination concerning his possession of quaaludes on the day in question clearly was related to his knowledge of the contents of the packages and thus was reasonably suggested by his denials on direct examination. Because the cross-examination was proper, the illegally seized evidence was admissible in order to impeach petitioner's false responses.

Petitioner argues, however, that *Havens* does not apply in this case because *Agnello* v. *United States, supra*, establishes that the cross-examination here exceeded the scope of the direct examination. In *Agnello*, a defendant charged with conspiracy to sell a package of cocaine testified on direct examination that he had possessed the packages involved but did not know what was in them. On cross-examination, he denied ever having seen narcotics. To rebut this testimony, a can of cocaine that had been illegally seized from his apartment was introduced. This Court held that the evidence should have been excluded, observing that "[i]n his direct examination, Agnello was not asked and did not testify concerning the can of cocaine" and "did nothing to * * * justify cross-examination in respect of the evidence claimed to have been obtained by the search." 269 U.S. at 35. The Court also stated that the exclusionary rule commands that illegally seized evidence "shall not be used at all." *Ibid.* As the Court explained in *Havens* (446 U.S. at 624-625), much of what was said in *Agnello* has since been repudiated, although the case has not been explicitly overruled. Rather, *Agnello* has essentially been limited to its

facts as a case where the cross-examination was found to have "too tenuous a connection" with the direct examination to permit impeachment by tainted evidence. 446 U.S. at 625.

Petitioner concedes (Pet. 17) that "[t]he facts in the instant case can be easily distinguished from both *Agnello* and *Havens*. The specific question on cross-examination in the instant case * * * has a closer nexus with [petitioner's] direct testimony than the broad question in *Agnello*." See also Pet. App. 22a-23a. In the words of the court of appeals (Pet. App. 22a n.2), the facts of this case "fall somewhere between *Agnello* and *Havens*."[4] Under the circumstances, the court of appeals correctly concluded that *Agnello*, as limited by *Havens* and its predecessors, has no relevance here. The particular facts of *Agnello* and *Havens* lend no guidance on the question whether the cross-examination here was proper, and thus the court of appeals' conclusion that it was proper is fully consistent with those cases.

2. Petitioner also contends (Pet. 19-21) that a mistrial should have been declared because the prosecutor's cross-examination forced him to invoke his privilege against self-incrimination in front of the jury. This contention is insubstantial and was correctly rejected by the court of appeals. See Pet. App. 25a-30a.

---

[4]In *Havens*, a defendant charged with importing cocaine testified on direct that he had nothing to do with the importation scheme. In his direct testimony, he acknowledged his co-defendant McLeroth's prior testimony at trial that the cocaine was taped or draped around McLeroth's body, but denied that he had "ever engage[d] in that kind of activity." 446 U.S. at 622. On cross-examination the prosecutor called attention to this response and asked whether he had anything to do with sewing makeshift pockets on McLeroth's T-shirt to enable him to bring cocaine into the country. When Havens denied that he had, the government was allowed to introduce a T-shirt illegally seized from his suitcase from which pieces had been cut that matched the pockets sewn onto McLeroth's T-shirt (*id.* at 622-623).

First, as the court of appeals noted (Pet. App. 26a), when petitioner took the stand to establish his innocence by testifying that he had no knowledge that the packages contained contraband, he waived his Fifth Amendment privilege with respect to proper cross-examination. See *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958); *United States* v. *Beechum*, 582 F. 2d 898, 907-909 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Hearst*, 563 F. 2d 1331, 1341-1342 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Because the question whether petitioner had ever possessed methaqualone or quaaludes was "reasonably related to his direct testimony that he did not know what was in the packages and did not intend to distribute controlled substances" (Pet. App. 29a), it was a proper cross-examination question, and petitioner had no right to invoke the Fifth Amendment and no basis for complaining that the question was asked.

Moreover, even assuming *arguendo* that the question was improper and that petitioner had some basis for believing he was entitled to invoke the privilege, there was no need for defense counsel to inform the jury that he would advise his client to take the Fifth Amendment. As the court below pointed out (Pet. App. 26a), petitioner should have "object[ed] to the question and take[n] the matter up outside the presence of the jury," and defense counsel's unnecessary statement in front of the jury cannot provide a basis for reversal of his conviction. In any event, any conceivable prejudice to petitioner was "more than overcome by the withdrawal of the question and the curative instruction of the trial court" (Pet. App. 30a) that the jury was to disregard the comments of counsel (Tr. B75).

3. Petitioner contends (Pet. 21-22) that there was insufficient evidence independent of the co-conspirator statements to prove that he knowingly participated in the conspiracy with Koutrumbas. This contention is without merit.

In fact, the government's proof of petitioner's role in the conspiracy rested on substantial non-hearsay evidence. That proof showed that on April 5, 1979, undercover Agent Miller posed as a purchaser and observed Koutrumbas and petitioner together at a restaurant where the purchase of drugs was to be made (Tr. A22-A23). The evidence further showed that petitioner placed three packages in Agent Miller's car (Tr. A23-A24). That petitioner was aware of the contents of the packages was readily apparent from his own statements made at the time of the purchase. After placing the boxes in Agent Miller's vehicle, petitioner pointed to them and stated, "twenty-four, twenty-four, and one," numbers that corresponded to the number of quaaludes that Koutrumbas had earlier agreed to sell Agent Miller—forty nine thousand (Tr. A24). Petitioner's knowledge of the contents of the packages was also demonstrated when he confirmed it to Agent Miller at the time of his arrest (Tr. A53, A157-A158). This proof showed that petitioner was a knowing participant in the conspiracy. Indeed, the district judge made a preliminary finding that the independent evidence showed a conspiracy between Koutrumbas and petitioner "beyond a reasonable doubt" (Tr. A30), a higher standard than the preponderance of the evidence test enunciated in *United States* v. *James*, 590 F. 2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), upon which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANN T. WALLACE
Attorney

NOVEMBER 1981

DOJ-1981-11